



Introduction to the Law of Arbitration

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Arbitration Law

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Introduction

- In the 1980s, demand for ADR in the commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation.
- Since this time, the use of private arbitration, mediation and other forms of ADR in the business setting has risen dramatically, accompanied by an explosion in the number of private firms offering ADR services.

Dispute Resolution Mechanism

- **1. Litigation in Courts**
- **2. ADR=Arbitration, Mediation, Conciliation, Mini Trials, Rent-a-Judge, med-arb, dispute resolution board, adjudication and etc.**
- **Lord Denning in *Modern Engineering (Bristol) Ltd v Miskin & Son*, [1981] 1 Lloyds Rep 135**
“Arbitration is one of the most important spheres of activity in the system of administering justice”.

Negotiation

- The most common form of dispute resolution, negotiation is the process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute.
- Compared with processes involving third parties, generally negotiation allows the disputants themselves to control the process and the solution.

Conciliation

- A process in which a third party meets with the disputants separately in an effort to establish mutual understanding of the underlying causes of the dispute and thereby promote settlement in a friendly, unantagonistic manner.

Mediation

- A voluntary and informal process in which the disputing parties select a neutral third party (one or more individuals) to assist them in reaching a mutually-acceptable settlement.
- Unlike a judge or arbitrator, the mediator has no power to impose a solution on the disputants; instead, the mediator assists them in shaping solutions to meet their interests.
- Mediators can employ a wide-range of techniques, e.g.: assist parties to communicate effectively and to develop a cooperative, problem-solving attitude; identify parties' underlying interests; identify and narrow issues; transmit messages between parties; explore possible options for agreement and the consequences of non-settlement.
- In Malaysia: The Mediation Insurance Bureau and The Banking Mediation Bureau, set up under the Companies Act 1965. The Malaysian Mediation Council, set up by the Bar Council

Arbitration

- An adjudicatory dispute resolution process in which one or more arbitrators issues a judgment on the merits (which may be binding or non-binding) after an expedited, adversarial hearing, in which each party has the opportunity to present proofs and arguments.
- Arbitration is procedurally less formal than court adjudication; procedural rules and substantive law may be set by the parties.

Differences

- Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party.
- Mediation and conciliation systems are very similar in that they
 - interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship.
 - Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement.
- Arbitration systems authorize a third party to decide how a dispute should be resolved.

Binding and Non-Binding ADR

- Negotiation, mediation, and conciliation programs are non-binding, and depend on the willingness of the parties to reach a voluntary agreement.
- ADR may be either binding or non-binding. Binding ADR such as arbitration produces a third party decision that the disputants must follow even if they disagree with the result, much like a judicial decision.
- Non-binding ADR produces a third party decision that the parties may reject.

Mandatory and Voluntary Processes

- **Mandatory:** Some judicial systems require litigants to negotiate, conciliate, mediate, or arbitrate prior to court action.
 - ADR processes may also be required as part of a prior contractual agreement between parties.
- **Voluntary processes:** Submission of a dispute to an ADR process depends entirely on the will of the parties.

Why a course on Arbitration Law?:

- Arbitration has now replaced Litigation as the primary means by which Business and Employment disputes are adjudicated.
 - Informality
 - Application of equity
 - **Direct Participation and Communication between Disputants**
 - **Party Autonomy**

Informality

- Arbitration processes are less formal than judicial processes.
- In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence.
- This informality is appealing and important for increasing access to dispute resolution for parts of the population who may be intimidated by or unable to participate in more formal systems.
- Reducing the delay and cost of dispute resolution.

Application of Equity

- Instruments for the application of equity rather than the rule of law. Each case is decided by a third party, or negotiated between disputants themselves, based on principles and terms that seem equitable in the particular case, rather than on uniformly applied legal standards.
- To achieve efficient settlements at the expense of consistent and uniform justice.

Direct Participation and Communication between Disputants

- More direct participation by the disputants in the process and in designing settlements.
- More direct dialogue and opportunity for reconciliation between disputants
- Potentially higher levels of confidentiality since public records are not typically kept
- More flexibility in designing creative settlements

Party Autonomy

**choice of tribunal, choice of procedure,
choice of place of arbitration**

*Esso Australia resources Ltd & 2 Ors v. The
Hon. Sidney James Plowman*

**It is well settled that when parties
submit their dispute to a private
contrary intention, they confer upon
that tribunal a discretion as to the
procedure to be adopted in reaching
its decision.**

Privacy and Confidentiality

- **No person is allowed to attend arbitration proceedings unless he is connected with it.**
- **In contrast, court proceedings would be attended by press and news (publicity). Commercial corporations if being sued would be implicated in two ways: business community would avoid conducting business dealings with a corporation that has had court actions and Public would think that the company has delivered defective products / failed to honour its obligations.**

Effective enforcement of award

- Domestic statutory laws of arbitration ensures enforcement of arbitral awards.
- Decisions typically are enforceable by courts and not subject to appellate review, except in the cases of fraud or other defect in the process. Often binding arbitration arises from contract clauses providing for final and binding arbitration as the method for resolving disputes

Types of Arbitration

- *Court-annexed arbitration*: one or more arbitrators, usually lawyers, issue a non-binding judgment on the merits after an expedited, adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial;
- *Private arbitration*: administered and managed, by private organizations, or non-administered and managed by the parties.

Legal Framework for Arbitration

- The Arbitration Act 1952/The Arbitration Act 2005.
- The old Act will continue to apply to arbitrations which have already commenced, and the new Act will apply to all other arbitrations.

Arbitration Act 2005

- Part I contains five sections which deal with commencement, interpretation, application to arbitration and awards in Malaysia, arbitrability of subject matter, and the applicability of the Act to government.

Cont...

- Part II: General provisions as regard to communications, waiver and extent of court intervention, and with arbitration agreement, composition of arbitral tribunal; jurisdiction of arbitral tribunal; conduct of arbitral proceedings, making of award and termination of proceedings; recourse against award; and recognition and enforcement of awards.

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- Part III: Deal with additional powers to supervise and/or support arbitration proceedings including the consolidation of arbitral proceedings; determination of preliminary points of law; appeals on questions of law; costs and expenses of an arbitration; and extension of time for commencing arbitration proceedings and for making award. The key provision in this section is the section which deals with appeals on points of law.

Cont....

- Part IV contains 5 sections which deal with miscellaneous provisions such as liability of arbitrator, immunity of arbitral institutions, bankruptcy, model of application, repeal and savings.

Elements of Arbitration

- i. Existence of agreement to refer the dispute to arbitration**
- ii. Arbitral tribunal must reach decision based on the facts**
- iii. The decision is binding on the parties – enforceable as a court order**

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